UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 11 Cr. 793 (ALC)

GERSAIN VIAFARA-MINA,

Defendant.

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August 11, 2016
3:10 p.m.

Before:

HON. ANDREW L. CARTER, JR.

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
EMIL J. BOVE, III
Assistant United States Attorney

FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
SABRINA P. SHROFF

Also present: ERICKA DE LOS RIOS, Spanish Language Interpreter

(Case called)

THE DEPUTY CLERK: Counsel, please state your appearance for the government.

MR. BOVE: Good afternoon, your Honor. Emil Bove for the government.

THE DEPUTY CLERK: For the defendant.

MS. SHROFF: Good afternoon, your Honor. For Mr. Viafara-Mina, Federal Defenders of New York, by Sabrina Shroff.

THE COURT: Good afternoon, Mr. Viafara-Mina.

THE DEFENDANT: Good afternoon, your Honor.

THE COURT: I see you're using the services of a Spanish interpreter. If you don't understand what I am saying as it's being translated from English to Spanish, please raise your hand. OK?

THE DEFENDANT: OK.

THE COURT: Have you understood everything I have said so far?

THE DEFENDANT: Yes, sir.

THE COURT: My understanding is that Mr. Viafara-Mina needs to be arraigned on a superseding information, and then he would like to plead guilty to a lesser included offense of Count One of the superseding information; is that correct?

MS. SHROFF: Yes, your Honor.

THE COURT: Mr. Viafara-Mina, I am going to ask you some questions, and I require that your answers be under oath, so I will ask my wonderful and talented deputy to administer an oath.

(Defendant sworn)

THE COURT: What is your full name?

THE DEFENDANT: Gersain Viafara-Mina.

THE COURT: How old are you?

THE DEFENDANT: 50 years old.

THE COURT: How far did you go in school?

THE DEFENDANT: Second semester of industrial engineering.

THE COURT: Have you recently been under the care of a physician or a psychiatrist?

THE DEFENDANT: No, sir.

THE COURT: In the last 24 hours, have you had any pills, medicine, drugs or alcoholic beverages?

THE DEFENDANT: No, none of them.

THE COURT: Is your mind clear as you sit here today?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, have you discussed the matter of waiving indictment with your client?

MS. SHROFF: Yes, your Honor.

THE COURT: Do you feel he understands the rights he is waiving by waiving indictment?

MS. SHROFF: Yes, your Honor.

THE COURT: Do you have any doubts as to his competence to proceed?

MS. SHROFF: No, your Honor.

THE COURT: I observe that Mr. Viafara-Mina appears alert. He has answered the questions appropriately. I find that he is competent to proceed and we will continue.

Mr. Viafara-Mina, have you seen a copy of the superseding information that's been filed against you in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had that translated in writing or orally into Spanish for you?

THE DEFENDANT: Yes, your Honor, it has been translated into Spanish.

THE COURT: Do you understand the charge contained in the superseding information?

THE DEFENDANT: Yes, sir.

THE COURT: The superseding information charges you with a felony. It charges that, from at least in or about 2010 up to and including in or about February 2015, in Colombia and elsewhere, and in an offense begun out of the jurisdiction of any particular state or district of the United States, that you, who was first brought to and arrested in the Southern District of New York and whose point of entry into the United States was the Southern District of New York, and others, did conspire together and with each other to commit an offense against the United States.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And that it was a part and object of the conspiracy that you and others would and did import into the United States and into the customs territory of the United States from a place outside thereof a controlled substance, in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1).

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And that it was a further part and object of the conspiracy that you and others would and did manufacture and distribute a controlled substance, knowing and intending that such substance would be unlawfully imported into the United States and into waters within the distance of 12 miles of the coast of the United States, in violation of Title 21, United States Code, Sections 959(a) and 960(a)(3).

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And that the controlled substance that you conspired to import into the United States, and into the customs territory of the United States, from a place outside thereof, and manufacture and distribute, knowing and intending that such substance would be unlawfully imported into the United States, and into waters within the distance of 12 miles of the coast of the United States, was five kilograms and more of mixtures and substances containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 960(b)(1)(B).

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: The government has charged an overt act and charges that, in furtherance of said conspiracy and to effect the illegal objectives thereof, that you committed the following overt act:

That on or about June 17, 2011, you participated in a telephone call, which was lawfully intercepted, regarding an aircraft capable of transporting 700 kilograms of cocaine, in violation of Title 18, United States Code, Section 371 and 3238.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: There is also a forfeiture allegation and a substitute assets provision in the superseding information.

Have you discussed those with your attorney as well?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the nature of the charge contained against you in Count One?

THE DEFENDANT: Yes, sir.

THE COURT: And you have discussed that with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Defense counsel, have you discussed the charge contained in the superseding information with your client?

MS. SHROFF: Yes, your Honor.

THE COURT: Mr. Viafara-Mina, you have a constitutional right to be charged by an indictment of the grand jury, but you can waive that right and consent to being charged by information of the U.S. Attorney.

Instead of an indictment, this felony charge against you has been brought by the U.S. Attorney by the filing of an information. Unless you waive indictment, you may not be charged with a felony unless a grand jury finds by return of an indictment that there is probable cause to believe that a crime has been committed and that you committed it.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you do not waive indictment, the government may present the case to the grand jury and ask it to indict you. A grand jury is composed of at least 16 and not more than 23 persons, and at least 12 grand jurors must find that there is probable cause to believe you committed the crime with which you are charged before you may be indicted. The grand jury might or might not indict you.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you waive indictment by the grand jury, the case will proceed against you on the U.S. Attorney's information just as though you had been indicted.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed waiving your right to indictment by the grand jury with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand your right to indictment by a grand jury?

THE DEFENDANT: Yes, sir.

THE COURT: Have any threats or promises been made to induce you to waive indictment?

THE DEFENDANT: No, sir.

THE COURT: Do you wish to waive your right to indictment by a grand jury?

THE DEFENDANT: Yes, sir.

THE COURT: Defense counsel, is there any reason why Mr. Viafara-Mina should not waive indictment?

MS. SHROFF: No, your Honor.

THE COURT: I have before me a waiver of indictment form that appears to be signed by you.

Is that your signature, Mr. Viafara-Mina?

THE DEFENDANT: Yes, sir, it is.

THE COURT: Before signing it, did you discuss it with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign it because you wish to waive your right to indictment?

THE DEFENDANT: Yes, sir.

THE COURT: I find that the waiver is knowingly and voluntarily made, and I accept it, and I will enter an order to that effect.

Let's proceed to the arraignment on the information.

Mr. Viafara-Mina, you have indicated that you understand the nature of the charge contained against you in Count One and discussed it with your attorney, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: The Court will enter a plea of not guilty to Count One on your behalf.

Now, Mr. Viafara-Mina, you have a constitutional right to continue to plead not guilty to Count One of the superseding information.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you persist in that plea of not guilty, you have a right to a speedy and public trial by a jury.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: At trial, and at every stage of this criminal litigation, you have the right to be represented by an attorney.

Do you understand?

THE DEFENDANT: Yes, of course.

THE COURT: If you could not afford to hire an attorney, the Court would give you an attorney for free.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And you have been appointed counsel free of charge, isn't that correct?

THE DEFENDANT: Yes, sir.

THE COURT: At trial, you would be presumed innocent, you would not have to prove that you are innocent.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: The burden of proof at all times would be on the government and the government would have to prove each and every element of the crime charged beyond a reasonable doubt.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Let's turn to those elements.

For Count One, the government would have to prove that you were first brought to and arrested in the Southern District of New York in the United States.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And that your point of entry into the United States was the Southern District of New York.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And that you knowingly and intentionally conspired with other people to commit an offense against the United States.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: That means that you knowingly, intentionally and willfully agreed with others to commit a crime against the United States.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And that it was a part and object of that agreement that you and others would import into the United States for a place outside thereof a controlled substance.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Let me just find out from the government, is the government's theory in this case that the conspiracy was to import the controlled substance into the United States or into the customs territory of the United States?

MR. BOVE: Principally into the United States, your Honor.

THE COURT: So, again, Mr. Viafara-Mina, the government would have to prove that it was a part and object of that agreement that you and others would and did import into the United States, from a place outside of the United States, a controlled substance.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And it was also a part and object of the conspiracy that you and others would and did manufacture and distribute a controlled substance.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: At the time that you and others agreed to manufacture and distribute the controlled substance, that it was part of the agreement that it was known and intended that such substance would be unlawfully imported into the United States.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And the government would have to prove that the controlled substance that you conspired to import into the United States, and manufacture and distribute, knowing and intending that it would be unlawfully imported into the United States, had a detectable amount of cocaine.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Let me find out what the government's position is. I understand Mr. Viafara-Mina is pleading guilty to the lesser included offense. Does the government feel it's necessary for me to tell him the elements of the greater offense or simply the lesser included offense?

MR. BOVE: I believe the lesser included offense will suffice for this proceeding.

THE COURT: Defense counsel.

MS. SHROFF: Your Honor, the only charge that matters is what he is pleading to.

THE COURT: OK. Do you understand that, Mr. Viafara-Mina?

THE DEFENDANT: Yes, sir. Yes.

THE COURT: The government has charged the overt act that on June 17, 2011, that you participated in a telephone call regarding an aircraft capable of transporting kilograms of cocaine.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty, you would be giving up your right to challenge the venue of this prosecution.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel for the government, have I left out any elements of Count One?

MR. BOVE: No, your Honor.

THE COURT: Counsel for the defense.

MS. SHROFF: No, your Honor.

THE COURT: So, Mr. Viafara-Mina, the government would have to prove each and every one of those elements to a jury beyond a reasonable doubt for you to be convicted of the crime included in Count One.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: In order to attempt to prove your guilt beyond a reasonable doubt, the government would call witnesses. Your lawyer could question those witnesses.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Your lawyer could object to evidence that the government sought to introduce against you.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: You could call your own witnesses at trial and your lawyer would have the subpoena power of the United States to make witnesses come to court for you.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: You could testify on your own behalf at trial, but at the same time, you could not be forced to testify because you have a right or privilege against self-incrimination.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: The right or privilege against self-incrimination means that you cannot be forced to say anything out of your own mouth that makes you appear guilty.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: So even if you are guilty, you are not required to plead guilty. You can remain silent and force the government to attempt to prove each and every element of Count One.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If the government failed to prove each and every element of Count One, the jury would be duty-bound to find you not guilty.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: So again, even if you are guilty, you are not required to plead guilty.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: In addition, if you plead guilty, I will have to ask you what you did that makes you guilty. If you answer those questions, you will be saying things out of your own mouth that make you appear guilty, thereby giving up your right against self-incrimination.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Let's talk about the sentencing process.

If I accept your plea of guilty, you will meet with the probation department and they will prepare a presentence report.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: That report will have information about you and the crime that you are alleged to have committed.

In addition, that presentence report will have the probation department's guideline calculation.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Have you and your attorney discussed the sentencing guidelines and how they might operate in your case?

THE DEFENDANT: Yes, sir.

THE COURT: The sentencing guidelines are advisory. What that means is, while I am required to determine the guideline range that applies to your case, once I make that determination, I am not required to sentence you within that range.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I will determine the guideline range that applies to your case, and I will determine the sentence, which may be within or outside of the guideline range.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: As you sit here today, there is no promise as to what your guideline range will be nor is there a promise as to what your sentence will be.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If the guideline range that I determine is different than what you were hoping for, that will not be a ground for you to take your plea back.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If the sentence that I impose, which may be within or outside of the guideline range I determine, is different from what you were hoping for, that will not be a ground for you to take your plea back.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Let's talk about your agreement with the government, Court Exhibit 1.

Is that your signature on the last page of that document?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have that document translated into Spanish for you, either in writing or orally?

THE DEFENDANT: Yes, your Honor, into Spanish.

THE COURT: Do you understand the agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Did you discuss it with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Does that agreement contain the entirety of your agreement with the government?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel for the government, is that correct?

MR. BOVE: Yes, your Honor.

THE COURT: Counsel for the defense, is that correct?

MS. SHROFF: Yes, your Honor.

THE COURT: Let's talk about the statutory penalties for Count One.

The maximum term of imprisonment is five years.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: The maximum term of supervised release is three years.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Supervised release is like a term of probation that you would serve after a term of custody. You would be subject to drug testing and visits to a probation officer's office.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: There would also be other limitations on your freedom.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you were to violate a condition of supervised release, you would be sentenced to an additional term of custody and an additional term of supervised release, without credit for time previously served in custody or on supervised release.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: You are subject to a maximum fine of the greatest of $250,000, twice the gross pecuniary gain derived from the offense or twice the gross pecuniary loss to persons other than you resulting from the offense.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: There is a $100 mandatory special assessment.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Under your agreement with the government, you admit the forfeiture allegation with respect to Count One of the information.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: There is a guideline estimate in your agreement with the government.

Have you and your attorney seen that and discussed that?

THE DEFENDANT: Yes, sir.

THE COURT: I remind you that is merely an estimate; that is not binding on the probation department, it's not binding on me. I will determine the guideline range that applies to your case.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I want to make sure you understand that if you are not a citizen of the United States, your guilty plea and conviction make it very likely that you will be deported from the United States.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed that with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Defense counsel, is that correct, have you discussed that with your client?

MS. SHROFF: Yes, your Honor.

THE COURT: You have a statutory right to appeal. If you cannot afford to hire an attorney to help you prosecute the appeal, the Court would give you an attorney for free.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: While you have a statutory right to appeal, under your agreement with the government, you have agreed not to file a direct appeal or bring a collateral challenge or seek a sentence modification of any sentence at or below 60 months' imprisonment.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions for me before we continue?

THE DEFENDANT: No, sir.

THE COURT: Do you have any questions you would like to ask your attorney in private before we continue?

THE DEFENDANT: No, sir.

THE COURT: Mr. Viafara-Mina, are you satisfied with your legal representation up to this point?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, are you aware of any reason why Mr. Viafara-Mina should not plead guilty?

MS. SHROFF: No, your Honor.

THE COURT: Are you aware of any legal defense to the charge?

MS. SHROFF: No, your Honor.

THE COURT: Mr. Viafara-Mina, are you willing to give up your rights to a trial and all the other rights that we have discussed?

THE DEFENDANT: Yes, sir.

THE COURT: Other than what is contained in Court Exhibit 1, your agreement with the government, has anyone made any threats or promises to induce you to give up those rights?

THE DEFENDANT: No, sir, no one.

THE COURT: Mr. Viafara-Mina, how do you plead to Count One of the superseding information, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: What did you do that makes you guilty of the crime included in Count One?

THE DEFENDANT: I participated in a telephonic call to speak about the plane and to bring five kilos of cocaine to Florida, five or more kilos.

THE COURT: You said you spoke to someone on a telephone, is that correct?

THE DEFENDANT: Yes.

THE COURT: And when you spoke to someone on the telephone about a plane, was that conversation about using a plane to bring the drugs into the United States?

THE DEFENDANT: I spoke with him; he asked me to help him. And then they said they were going to give me five kilos, five kilos in Florida.

MS. SHROFF: Your Honor, may I just have a second?

THE COURT: Yes.

(Counsel confers with defendant)

THE DEFENDANT: I participated in phone calls --

(Counsel confers with defendant)

THE DEFENDANT: I helped them. These people asked me to help them to transport those drugs to the United States.

THE COURT: Where were these drugs coming from?

THE DEFENDANT: From Venezuela to Honduras.

THE COURT: And you had an agreement with others to have those drugs brought into the United States from Venezuela and Honduras?

THE DEFENDANT: Yes.

THE COURT: And as part of the agreement, the drugs that were being brought to the United States contained cocaine?

THE DEFENDANT: Yes, sir, it had cocaine.

THE COURT: And you knew that that was the purpose of the agreement, is that correct?

THE DEFENDANT: Yes, it's correct.

THE COURT: OK. Anything else from the government?

MR. BOVE: I would just proffer for the record, for purposes of venue, that the defendant was extradited from Colombia and first brought to this district, and, specifically, an airport in Westchester.

THE COURT: Did you hear that, Mr. Viafara-Mina?

THE DEFENDANT: Yes, sir.

THE COURT: Anything else from the government?

MR. BOVE: No, your Honor. Thank you.

THE COURT: Let me just ask you this, Mr. Viafara-Mina. This conversation that you had, did this take place between 2010 and February 2015?

THE DEFENDANT: Yes, sir.

THE COURT: Anything else from the government?

MR. BOVE: No, your Honor. I think it's clear from the allocution that there are some facts that need to be developed at sentencing, and we will proceed at that time with those additional facts.

THE COURT: Anything else from the defense?

MS. SHROFF: No, your Honor. I didn't hear what Mr. Bove said.

THE COURT: I believe he said that he believes from the allocution there are some other facts that may need to be developed at sentencing.

MS. SHROFF: OK.

THE COURT: Anything else in terms of allocution from the defense?

MS. SHROFF: No, your Honor.

THE COURT: I find that Mr. Viafara-Mina -- let me not speak for the government.

Is that a fair assessment of what counsel for the government stated?

MR. BOVE: It is, your Honor. Thank you.

THE COURT: I find that Mr. Viafara-Mina understands the rights he is waiving by pleading guilty. I further find that there is a factual basis for the plea. I accept his plea of guilty. We will schedule sentencing for Friday, November 18, at 11 a.m.

I will order that counsel for the government provide an offense statement to probation within three weeks, and that counsel for the defense arrange the presentence interview within three weeks. That doesn't mean the interview needs to take place within three weeks, but within three weeks the interview needs to be scheduled.

Anything else from the government?

MR. BOVE: No, your Honor. Thank you.

THE COURT: Anything else from the defense?

MS. SHROFF: No, your Honor. Thank you.

THE COURT: Thank you.

(Adjourned)